(4)

No. 90-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

POWELL DUFFRYN TERMINALS, INC.,

Petitioner,

vs.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., FRIENDS OF THE EARTH and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

*NATHAN M. EDELSTEIN, ESQ.
RIDOLFI, FRIEDMAN, FRANK, EDELSTEIN & BERNSTEIN, P.C.
Attorneys for Petitioner Powell Duffryn Terminals, Inc.
3131 Princeton Pike
Building 6A
Lawrenceville, New Jersey 08648
(609) 896-2900

*Counsel of Record

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Petitioner, Powell Duffryn Terminals, Inc., respectfully submits this reply brief in support of its Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

REASONS FOR GRANTING THE WRIT

1. INTERVENTION BY THE EPA DOES NOT CURE THE JURISDICTIONAL DEFECT WHICH HAS BARRED THIS SUIT FROM ITS OUTSET, NOR DOES THIS INTERVENTION REMEDY THE ERRONEOUS RULE FOR STANDING ESTABLISHED BY THE COURT OF APPEALS

The United States Environmental Protection Agency ("EPA") received notification in March, 1983 of plaintiffs' intention to file suit under §505 of the Federal Water Pollution Control Act ("FWPCA" or the "Act"). A-51.[1] EPA however did not initiate suit against Powell Duffryn ("PDT") under the Act, nor during the ensuing six years did EPA intevene in any proceedings before the district court. When the case reached the court of appeals in 1989, EPA intervened on the limited issue, which is not related to this Petition, of "whether the district court exceeded its jurisdiction by reducing a civil penalty, and then diverting the reduced penalty from the federal Treasury to an environmental trust fund." Ra1. Such intervention in the court of appeals does not cure the jurisdictional defect in the district court resulting from respondents' lack of standing. Respondents' argument to the contrary in its opposition brief is not a viable contention.

Because Article III limits the power of a federal court to entertain an action, standing must exist at all stages of the proceeding, including the time when the complaint was filed. Cf. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). See also, *Safir v. Dole*, 718 F.2d. 475, 481 (D.C. Cir. 1983) ("Standing, since it goes to the very power of the court to act, must exist at all stages of the proceeding. . . ."), cert. den. 467 U.S. 1206 (1984). Respondents must have had standing to pursue this litigation at the time

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[1] "A-51" refers to page 51 of the joint appendix filed in the court of appeals. "Ra____" refers to the appendix to this reply brief. "____a" refers to the appendix to Powell Duffryn's Petition for a Writ of Certiorari.

they filed their complaint, for if they did not, the district court was without Article III jurisdiction to enter its judgment, and that judgment accordingly may not stand.[2]

Further, it is equally well established that intervention cannot cure a jurisdictional defect that would have barred the federal court from hearing the original action. In fact "[by] its very nature intervention presupposes pendency of an action in a court of competent jurisdiction. . . ." *Black v. Central Motor Lines, Inc.*, 500 F.2d. 407, 408 (4th Cir. 1974). " 'An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit. . . .' " *Id.* citing *Kendrick v. Kendrick*, 16 F.2d. 744, 745 (5th Cir. 1926)

In *Roberts v. Carrier Corporation, et al.*, 117 FRD 426, 428 (N.D. In. 1987) the court, citing Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, §1917 (2d ed. 1986), added that, " 'Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action.' " Instead if jurisdiction "is lacking at the commencement of the suit, it cannot be aided by . . . intervention." *Pianta v. H.M. Reich Co., Inc.*, 77 F.2d. 888, 890 (2d Cir. 1935). See also, *Pressroom Unions, Etc. v. Continental Assur. Co.*, 700 F.2d. 889, 893 (2d Cir. 1983), cert. den. 454 U.S. 845. Hence intervention cannot create jurisdiction where it otherwise is absent. *Jacobs v. District Director of Internal Revenue*, 217 F.Supp. 104, 106 (S.D. N.Y. 1963).

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[2] The facts of this case make especially apparent that EPA's intervention does not relieve respondents from their obligation to establish Article III standing. EPA has never addressed the merits of respondents' claim, but rather intervened solely to address the propriety of the district court's reduction of the civil penalty and the diversion of the penalty to an environmental trust fund. Respondents alone pursued the claim that petitioner had violated the Federal Water Pollution Control Act, and the district court's jurisdiction to enter judgment on that claim depended solely on respondents' standing to raise it. Respondents stipulated, moreover, that their standing is to be based on the record, in support of standing, as of the district court's order of January 13, 1986. Ra2 (A-615, excerpt from pre-trial order).

In *United States Ex. Rel. Texas Portland Cement Company v. McCord*, 233 U.S. 157, 163 (1913) plaintiffs filed suit prematurely under the terms of the "act of February 24, 1905 (c. 778, 33 Stat. 811)" (hereafter the "Act"). Thus the court lacked jurisdiction. Although the "bill was prematurely filed," one party (named Illingsworth) intervened within the statutorily permitted time period for initiating suit, which commenced six months after accrual of the claim. Justice Day wrote for the Court.

> "As to the intervention of Illingsworth, in which it is claimed, other creditors' claims were incorporated . . . we fail to see that this mends the matter.
>
> * * *
>
> These rights to intervene and to file a claim, conferred by statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit."

The act of intervening does not, therefore, confer jurisdiction where none previously exists. In the cases cited by respondents, the courts acquired jurisdiction at the outset of the cases through the original parties. These cases are therefore inapposite to this case. Subject matter jurisdiction must exist at the time the action is commenced. *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d. 241, 245 (9th Cir. 1988) cert. den. 488 U.S. 1006 (1989).

Respondents' contrary argument — that jurisdiction is established in the district court through EPA intervention at the appellate level six years after suit was started, and after final judgment was entered — is fundamentally flawed. EPA intervention in the court of appeals does not relieve respondents from their burden to establish Article III standing. *U.S. Ex Rel Texas, etc., supra.*

2. THE COURT OF APPEALS IMPROPERLY CREATED A SPECIAL EXCEPTION TO ARTICLE III'S STANDING REQUIREMENTS FOR CITIZEN PLAINTIFFS IN CLEAN WATER ACT CASES, AND THIS ERRONEOUS RULE OF LAW REQUIRES REVERSAL

Respondents claim that the court of appeals' decision "follow[s] the well-established law of this Court . . . [and involves] the application of correct principles of law to a particular factual situation. . . ." Opposition Brief at page 22 (hereinafter "Opp. Br. ____"). This is incorrect. Under the Third Circuit's new rule for standing in "Clean Water Act case[s]," evidence that a defendant did not cause or contribute to the injury complained of by a citizen-plaintiff has become legally irrelevant. *PIRG, et al. v. Powell Duffryn Terminals, Inc.*, 913 F.2d. 64, 72 (3rd Cir. 1990) (14a). Causation now is established, as a matter of law, simply by showing that a pollutant has been discharged in excess of an NPDES permit limit, and that the pollutant may cause or contribute to the "kind" of injury alleged by plaintiff, even if plaintiffs' members recreate at a location which is far removed from the discharge. This holding constitutes relaxation of Article III's standing requirement for causation and redressability, and improperly establishes a special exception, for environmental cases, to these constitutional limits on citizen standing.

The error of the Third Circuit's new test for standing, where defendant does not in fact cause or contribute to the actual injuries alleged by plaintiffs' members, but where standing is nonetheless upheld, is shown clearly in the record in this case. Powell Duffryn produced expert testimony at trial that, to a reasonable scientific certainty, its discharge did not cause or contribute to plaintiffs' members' alleged injuries. A-2018 to 2020. Sworn affidavits by LeRoy Sullivan, an expert in environmental engineering, and Allen Dresdner, a professional planner, further attested not only that PDT's discharge neither caused nor contributed to plaintiffs' alleged injuries, but also that the source of those injuries was downstream from Powell Duffryn. 3k-4k, 2(1)-4(1). In fact the record additionally shows that the segment of the Kill Van Kull into which PDT discharges exhibited *none* of the characteristics about which plaintiffs' members

complained. 2(1), 2m. Unrebutted sworn affidavits attested that *Powell Duffryn* "is not the source" of plaintiffs' alleged injuries. 3k. To the court of appeals, however, this proof was irrelevant, 914 F.2d. at 72, and the court was unequivocal in this regard: "In a Clean Water Act case" causation is now to be established without evidence that defendant's conduct is in actuality a cause of plaintiffs' alleged injuries. 14a. See *contra, Warth v. Seldin*, 422 U.S. 490, 499 (1975). Indeed under the Third Circuit's decision, "[c]onjectural or 'hypothetical' " causation is now the legal standard on which to find and uphold standing. But see, *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

No decision by this Court or another court of appeals sanctions the Third Circuit's substantial relaxation of Article III's requirements for standing. Rather, the court of appeals' new rule contradicts the specific factual inquiry to determine standing required by this Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) and *Allen v. Wright*, 468 U.S. 737, 751 (1984). In its place, the court has established a formulaic test to determine if a citizen-plaintiff, in a Clean Water Act case, has standing. Proof by a defendant that it did not contribute to plaintiffs' injury has been rendered immaterial.[3]

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[3] Respondents are incorrect when they argue that the "court below proposed no new criteria for . . . any . . . requirement of standing." Opp. Br. 9-10, 20. The court clearly did so and, in fact, it is this very relaxation of Article III standing by the court that is the predicate given by Judge Aldisert for his concurring opinion —

> "Throughout my extensive preparation of this case . . . I was persuaded that the member/plaintiffs had failed to show an actual injury that was fairly traceable to the permit violations (41a) . . . I find standing here only on the most questionable grounds — a belief that somehow the Supreme Court might be inclined to relax its stringent requirements of standing in environmental cases (42a) . . . What troubles me from the testimony is any indication that the injury-in-fact was fairly traceable." 53a. 913 F.2d. at 83-84, 88.

Respondents' argument that the court merely applied "correct principles of law to a particular factual situation" mis-casts the precedent-setting decision of the Third Circuit. Opp. Br. 20.

This broad rule for standing adopted by the Third Circuit significantly changes and expands the causation and redressability aspects of standing in §505 cases, which is precisely what the court of appeals intended to achieve because, under this Court's rules for standing, respondents' members otherwise lacked the requisite elements of causation and redressability. The record showed that PDT's discharge did not cause or contribute to plaintiffs' alleged injuries, and respondents admitted having no facts regarding the effects of PDT's discharge on the Kill Van Kull. 2j. Indeed, respondents lack of "causation evidence" was underscored by their expert (Dr. Bruce Bell), on whom they rely in their opposition brief (Opp. Br. 17). Dr. Bell testified during cross-examination at trial that –

> "Q. [By PDT] Now, neither in your report nor in your analysis of Powell Duffryn's history at the site did you evaluate the impacts of Powell Duffryn's discharge on the Kill Van Kull or any receiving waters, did you?
>
> A. [By Dr. Bell] No. I did not." A-1487.

In his deposition Dr. Bell admitted additionally that he did not "know anything at all about the Kill Van Kull . . . [on which to] form an opinion whether Powell Duffryn's discharge has caused [or will cause] an adverse effect. . . ." A-1221 to 1222.

In addition Dr. Bell testified further that he did *not* "know of any facts on which to base an opinion that Powell Duffryn's discharge, either now or in the past, has caused or contributed to and/or otherwise has been related to any change in dissolved oxygen in the Kill Van Kull." A-1230. What he concluded – and what respondents base standing on – was that,

> "Q. [By PDT] So all you know is that if you put something in a body of water, there is potential for an impact, but whether that ever happened in Powell Duffryn's case, you don't know.
>
> A. [By Dr. Bell] That's correct." A-1216.

Confronted with facts demonstrating that PDT's discharge was not the cause of the conditions on which respondents based their standing (and thus that plaintiffs lacked standing), the court of appeals chose to relax traditional standing requirements to permit suit without proof of causation. The court of appeals accepted respondents' legal position, which respondents repeat to this Court, that establishing standing under the Clean Water Act *"requires no such showing."* See Opp. Br. 13, n.6. That is, evidence that the discharge at issue caused or contributed to the injury alleged is not required. *Id.* at 14 (arguing that a permit exceedance which generally "contribute[s] to the polluted condition" of a waterway establishes causation).[4]

Hence, under the Third Circuit's decision, if a permittee discharges a pollutant which might cause the "kind" of injury a plaintiff complains about — even if in the case at bar the permittee in fact has not contributed to that injury — then Article III causation is nonetheless deemed satisfied as a matter of law. This new legal standard has substantial adverse implications. Although Powell Duffryn is located miles from where respondents' members recreate, respondents claim that because these watercourses are "tidally connected," causation flows from

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[4] Respondents argue erroneously that, without such a rule for standing, it would be "impossible" to show causation and that "no plaintiff [including EPA] could bring enforcement actions against polluters." Opp. Br. 20. This is clearly erroneous. Proof of causation has become standard, through expert testimony such as by Mr. Sullivan, an environmental engineer, and/or pollutant tracing by computer modelling. See e.g., *Oklahoma v. EPA*, 908 F.2d 595, 607 (10th Cir. 1990) (noting that computer modelling can predict the extent of a discharger's impact on water quality standards); *Marathon Oil v. EPA*, 830 F.2d. 1346, 1348-49 (5th Cir. 1987) (EPA used computer modelling programs to analyze a discharge's impact on water quality standards); and *NRDC v. Zeller*, 688 F.2d. 706, 714 (11th Cir. 1982) (upholding the validity of an interagency agreement requiring the use of modelling to analyze water quality impact).

Further, respondents fail to appreciate a fundamental aspect of the law of standing in arguing that the United States is subject to the same limitations as are citizen plaintiffs. Opp. Br. 20. Unlike a citizen plaintiff, the federal government's standing to enforce the Act derives from Article II of the Constitution — the duty to faithfully execute and enforce federal law.

a discharge anywhere along the waterways. Opp. Br. 14. The court of appeals has adopted this standard. Thus, under the Third Circuit's test for causation, an industrial facility located many miles to the north on the Hudson River is equally susceptible to suit if it has discharged "O&G" (oil and grease) in excess of its permit limit. There is no point of attenuation under the Third Circuit's decision.[5] No linkage is required between defendant's conduct and the actual injury alleged. This indeed is a new test for standing. Under it, there is no "principled basis" to differentiate among permittees. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472 (1982).

This Court's principles for standing are, however, directly to the contrary. In *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990) the Court has required that citizen-plaintiffs identify the site of their alleged injuries, *and* the connection if any between defendant's conduct and impacts at that site. Respondents failed in these proofs, and to accommodate that omission the court of appeals relaxed Article III and crafted a new test for "Clean Water Act cases" 913 F.2d. at 82, (14a). Causation however does not flow inexorably with the tides. The Third Circuit's decision in *Powell Duffryn* is an erroneous controlling precedent on causation and redressability, and it should be reversed.

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[5] Yet it is clear that the downstream impact of a particular pollution source will become so attenuated as to have no effect on water quality. See *Oklahoma, et al. v. EPA, supra*, 908 F.2d. 595, 607 (10th Cir. 1990).

CONCLUSION

Petitioner submits that for the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NATHAN M. EDELSTEIN*
RIDOLFI, FRIEDMAN, FRANK,
EDELSTEIN & BERNSTEIN, P.C.
Counsel for Petitioner
3131 Princeton Pike
Building 6A
Lawrenceville, New Jersey 08648
(609) 896-0999

* *Counsel of Record*

APPENDICES

CORRESPONDENCE TO THE COURT FROM THE OFFICE OF THE SOLICITOR GENERAL

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

December 7, 1990

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Powell Duffryn Terminals, Inc. v. Public Interest Research Group of New Jersey, Inc., et al.*, 90-867

Dear Mr. Spaniol:

A petition for a writ of certiorari was filed by Powell Duffryn Terminals, Inc., on November 30, 1990. It presents the single issue of whether an environmental organization had demonstrated standing to sue in this case.

The United States Environmental Protection Agency was permitted to intervene before the Third Circuit Court of Appeals and therefore is named as a respondent in this Court. However, our intervention was sought, and granted, only on the issue of whether the district court exceeded its jurisdiction by reducing a civil penalty, and then diverting the reduced penalty from the federal Treasury to an environmental trust fund. We never raised, or briefed, the standing issue now presented by the petitioner. Accordingly, we do not intend to file a response to the petition unless requested to do so by the Court.

Sincerely,

Kenneth W. Starr
Solicitor General

EXCERPT FROM PRE-TRIAL ORDER (A-615)

Plaintiffs' Standing

1. The parties do not agree whether plaintiffs have standing in this case. Defendant moved to dismiss the case for lack of standing on or about December, 1984 and plaintiffs submitted five affidavits in support of their standing. Those affidavits were executed by Sheldon Abrams, Melissa Van Ditti, Douglas MacNeil, Andrew Gerbino and Cheryl Cummings. By Order dated January 13, 1986, the Court determined that plaintiffs have standing. All rights of appeal in this regard have been preserved by defendant.

2. Without waiving defendant's right to appeal this Court's order of January 13, 1986, with regard to defendant's challenge to plaintiffs' standing, in order to avoid the need for the testimony of individual members of the citizen-plaintiff organizations at the trial on relief, the parties stipulate that plaintiffs will not present testimony on the issue of plaintiffs' continued standing in this case at the trial on relief. The parties further stipulate that, if plaintiffs had standing to maintain this action at the time of this Court's order of January 13, 1986, then plaintiffs continue to have standing at the time of the trial on relief in this matter and that, if plaintiffs lacked standing at the outset of this case or at the time of the Court's Order of January 13, 1986, then plaintiffs also lack standing at the time of the trial on relief in this matter.

3. This stipulation as to standing does not relate to the issue of mootness, if any.